

September 11, 2006

Kent County - Civil Division (739-7641)

Mr. Robert P. Reeder
1302 Barksdale Road
Newark, DE 19711

**RE: Freedom of Information Act Complaint Against
Christina School District Board of Education**

Dear Mr. Reeder:

On July 13, 2006, our Office received your letter alleging that the Christina School District Board of Education ("the School Board") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by meeting twice in private on July 10, 2006 to discuss matters of public business without notice to the public.

By letter dated July 17, 2006, we asked the School Board to respond to your complaint by July 28, 2006. We received the School Board's response on July 28, 2006. We then made several requests to the Board for additional information, which we received over the course of August 22-29, 2006.

According to the School Board:

At 7:30 on July 10 the Superintendent and senior administrators met with Board members Beverly Howell and Gina Backus. The session lasted approximately one hour. At noon on July 10 the Superintendent and senior administrators met with Board members Jimmy Durr and George Evans. Board member John MacKenzie participated in a portion of the meeting by telephone. This session lasted about an hour and 30 minutes.

The School Board explains that "the purpose of each of these meetings was to brief Board members on the reduction in force and the tax warrant recommendations the Superintendent would make at the Board's July 11, 2006 meeting." The Board acknowledges that these two meetings "went beyond the mere passive receipt of information to include, at least to some extent, the active exchange of information and opinions." According to the School Board, "All of the information presented to Board members at the July 10, 2006 meetings was presented at the Board's open session on July 11, 2006, with the exception of identifying the names of employees affected by the reduction in force." The School Board acknowledges that it did not post public notice for the two discussions on July 10, 2006 between the Superintendent and Board members.

On June 30, 2006, the School Board posted notice of a public meeting for July 11, 2006 at 7:30 p.m. preceded by an executive session at 6:00 p.m. to discuss personnel and legal matters. The agenda listed among other items for public discussion: "Approval of 2006-2007 Tax Warrant and Resolution"; and "Personnel Recommendations."

The minutes of the July 11, 2006 public meeting reflect that all seven members of the Board attended (Backus, Scherer, Resler, Mackenzie, Evans, Howell, and Durr). The minutes show that

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"Kathy Dick-Frederick presented the 2006-2007 Tax Warrant Resolution and answered questions. It was moved by Mr. Evans, seconded by Dr. Mackenzie, and unanimously carried that the Christina Board of Education approve the Fiscal Year 2007 Tax Warrant and Resolution."

The minutes of the July 11, 2006 meeting show that "Ed Bosco presented the recommendation for reductions in force for paraprofessionals and security associates." Five members of the School Board (two abstained) voted to terminate nine security associates and 71 paraprofessionals effective August 14, 2006.

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed for" executive session as authorized by law. 29 *Del. C.* §10004(a).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10001(e).

FOIA requires all public bodies to "give notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda," *Id.* §10004(e)(2).

LEGAL ANALYSIS

A. July 10, 2006 Meetings

Our Office has previously determined that a public body may achieve a quorum for purposes of FOIA through serial discussions which allow members of a public body "to receive and comment on other members' opinions and thoughts, and reach a consensus on action to take." *Att'y Gen. Op.* 03-IB11 (May 19, 2003) (exchange of e-mails between the three members of a nominating committee over a two-day period). For serial discussions to amount to a constructive quorum, there must be "an active exchange of information and opinions" as opposed to "the mere passive receipt of information." *Id.*

"It is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum." *Att'y Gen. Op.* 06-ID16 (Aug. 7, 2006). Serial discussions may amount "to a constructive quorum of the public body when there was an active exchange of thoughts and opinions and members were asked to vote or adopt a particular point of view or reach a consensus on what action to take." *Id.*

In *Att'y Gen. Op.* 04-IB10 (Oct. 18, 2004), a member of the county council drafted a memorandum proposing to allocate \$15 million to the City of Wilmington for law enforcement and then circulated a copy of the proposal to the other six members of the council. Four members of the council signed the proposal which stated it "represents a consensus" based on telephone conversations among members of the council. Our Office determined "that those serial telephone calls amounted to a meeting of a quorum of the council in violation of [FOIA]."

In *Att'y Gen. Op.* 05-IB03 (Feb. 3, 2005), a member of the town council drafted a letter

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critical of another member of the council and circulated it to three members of the five-member council, following up with telephone or face-to-face conversations to see if they agreed with her position. Our Office determined that "these contacts were more than the passive receipt of information" and "the sum of these communications amounted to a meeting of a public body covered by FOIA."

The School Board has seven members and four members constitute a quorum. The record shows that, collectively, five Board members participated in the two meetings with the Superintendent on July 10, 2006 to discuss reductions in force and tax warrants. We believe that these two meetings amounted to a constructive quorum for purposes of FOIA. The meetings were scheduled only a few hours apart, the subjects discussed were the same, and the School Board acknowledges that the meetings "went beyond the mere passive receipt of information."

The Board originally intended to hold a single meeting with the Superintendent on July 10, 2006 and provided us with a copy of a "posting" for that meeting. The posting stated the purpose of the meeting was "to review and receive materials for the July 11, 2006 Board of Education meeting. This meeting is being posted because a quorum may be present. The Board may go into Executive Session to discuss Personnel and Legal Matters."

The Board never posted that notice to the public, apparently because not all members could make the meeting at noon, so a first meeting was held at 7:30 a.m. between the Superintendent and two Board members and a second meeting at noon between the Superintendent and three other Board members. Under these circumstances, we believe that the two back-to-back meetings amounted to

a constructive quorum of the Board.¹

We determine that the School Board violated the public notice requirements of FOIA by failing to post a notice and agenda for the two meetings on July 10, 2006 with the Superintendent which involved a quorum (five members) of the Board.

C. Remediation

We do not believe that any remediation is necessary for these violations of the open meeting law. The School Board could have met privately on July 10, 2006 with the Superintendent to discuss reductions in force under FOIA's personnel exemption for executive session. *See Att'y Gen. Op.* 06-IB15 (July 24, 2006) (no remediation directed because "the Board could have lawfully met in executive session to discuss the qualifications of job applicants for the position of superintendent").

FOIA did not authorize the School Board to meet in executive session to discuss tax warrant resolution. We do not believe that remediation is necessary, however, because the Board noticed the tax warrant resolution for the July 11, 2006 public meeting and there was public discussion of the resolution before the Board voted to approve. *See Att'y Gen. Op.* 06-IB12 (June 19, 2006) ("the council noticed the issue for discussion [at a public meeting] and voted in public"); *Att'y Gen. Op.* 06-IB05 (Mar. 27, 2006) (city council cured the FOIA violation by a "thorough public airing of the

¹ In *Att'y Gen. Op.* 06-ID16 (Aug. 7, 2006), our Office suggested that serial discussions in groups of less than a quorum might violate FOIA if they were a deliberate attempt to circumvent the open meeting law. In determining whether serial meetings are lawful under FOIA, we will from now on use a constructive quorum analysis based on objective factors rather than delving into the subjective issue of intent. That is not to say, however, that a deliberate attempt to avoid the open meeting law may not be relevant to the issue of remediation.

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issue before the Council voted").

CONCLUSION

For the foregoing reasons, we determine that the School Board violated FOIA when a constructive quorum of the Board met with the Superintendent on July 11, 2006 to discuss reductions in force and tax warrants without notice to the public.

We do not direct any remediation for this violation because: (1) the Board could have met privately on July 10, 2006 to discuss the reductions in force under FOIA's personnel exemption for executive session; and (2) the tax warrant resolution was on the agenda for the July 11, 2006 public meeting, and the public had a right to review the resolution and ask questions before the Board voted to approve.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

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State Solicitor

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